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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 304

THE BROWN INSTRUMENT COMPANY,
Petitioner,

vs.

SAM B. WARNER, REGISTER OF COPYRIGHTS,
Respondent.

Motion of Fawley-Brost Company, the Amicus Curiae Below, for Leave to File Brief as Amicus Curiae,

and

Brief Opposing Certiorari.

ALBERT I. KEGAN,
ESTHER O. KEGAN,
Attorneys for Fawley-Brost Company.

THE GUNTHORP-WARREN PRINTING COMPANY, 220 WEST JACKSON, CHICAGO

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, members of the bar of this Court, as counsel for the applicant, Fawley-Brost Company, respectfully move for leave to file the accompanying brief as *amicus curiae,* in view of the following extraordinary and exceptional circumstances:

1. Applicant, Fawley-Brost Company, Inc., of Chicago, Illinois, was the successful party in *Taylor Instrument*

Companies v. *Fawley-Brost Co.*, 139 F. 2d 98, which case held that instrument charts are not copyrightable. As more fully appears in Point 2 hereinafter, at page 12, petitioner participated in the *Taylor* case with applicant's consent, and represented to this Court that certiorari in the *Taylor* case would settle the copyrightability of "such 'charts'" manufactured by it.[1] This Court denied certiorari, 321 U. S. 785 (1944).

2. Applicant is an independent printer which manufactures and sells charts used as replacement parts in machines manufactured by petitioner, which charts are copied from petitioners'. Petitioner has avowed its intention of suing applicant for copyright infringement, if it can persuade this Court to overrule the law of *Taylor* v. *Frawley-Brost*.[2]

3. Accordingly petitioner instituted this suit (a) to secure the copyright certificates prerequisite to suing applicant, and (b) to bring the rule of *Taylor* v. *Fawley-Brost* before this Court a second time. Furthermore, the Register of Copyright was selected as a particularly desirable defendant, because (a) he has no personal interest in maintaining the rule of the *Taylor* case, (b) the Copyright Office is not experienced with machines and the principles of machinery parts like the charts in issue, and (c) the Copyright Office will gain the revenue from registration fees upon machine charts, if the Register loses in this suit.

4. The Copyright Office informed the undersigned of this suit as soon as service was made on respondent's predecessor in office, and the undersigned were invited to assist respondent's counsel.

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1. No. 689, October term, 1943. Brief of Brown Instrument Co., p. 4.

2. Petitioner's counsel so informed the court below, on oral argument.

5. The undersigned, as attorneys for applicant, have worked with respondent's counsel in the Department of Justice continuously since the inception of this suit; have participated in the preparation of every paper filed herein in respondent's behalf, and in the accumulation and preparation of all the evidence presented for respondent, and have also provided the recording machine and the expert witness used by the Department of Justice on behalf of respondent. Mr. Kegan sat at the counsel table throughout both the trial and the appeal below, assisting respondent's trial attorney. In accordance with the customary practice in the Department of Justice, respondent is being represented in this Court by attorneys of the certiorari section, who heretofore have had no connection with this case, as the undersigned are informed and believe.

6. The court below appointed applicant as amicus curiae in this cause, over petitioner's vehement opposition, on full consideration of briefs directed to that issue. The Acting Solicitor General, on behalf of the Register of Copyrights, respondent herein, has consented to applicant's participation herein as *amicus curiae.*

7. Petitioner has refused to consent to applicant's appearance herein, solely on the ground that **"This controversy is a private one."**[1]

Applicant submits that whether the controversy be private or public, applicant is a real and immediate party in interest, and therefore should be permitted to file the annexed brief. The situation is analogous to that in *Universal Oil Co.* v. *Root Refining Co.*, 328 U. S. 575 (1946), where Skelly Oil Co. and its attorneys *pro se* moved for leave to appear

1. The letter from petitioner's counsel is printed verbatim as Appendix E, page 21 hereinafter, and the original has been filed with the Clerk of this Court.

as *amici curiae,* and were allowed to file briefs and even to argue orally at final hearing.

ALBERT I. KEGAN,
ESTHER O. KEGAN,
Counsel for Fawley-Brost Co. as amicus curiae.

BRIEF OF FAWLEY-BROST COMPANY, AS AMICUS CURIAE, ADVOCATING THAT CERTIORARI BE DENIED.

OPINIONS BELOW.

The Brown Instrument Company v. Sam B. Warner, Register of Copyrights, (1946) 68 U. S. P. Q. 41, 42 (R. 42).

The Brown Instrument Company v. Sam B. Warner, Register of Copyrights, (App. D. C., 1947) 161 F. 2d 910.

JURISDICTION.

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1. The judgment of the Court of Appeals was entered on June 2, 1947 (R. 174); the petition for certiorari was filed August 27, 1947.

2. The discretionary jurisdiction of the Court is invoked under the Judicial Code, section 240(a), as amended by the Act of February 13, 1925, ch. 229, 43 Stat. 938 (28 U. S. C. Sec. 347).

THE QUESTION PRESENTED.

May printed blank forms be monopolized by copyright, although they convey no message, and are indispensable mechanical parts of a machine?

COUNTER STATEMENT OF THE MATTERS INVOLVED.

1. Petitioner manufactures automatic recording measuring machines, such as thermometers, and replacement parts therefor, including replaceable paper "charts" or scales bearing printed reference lines and numerals which co-act with the pointer of the machine in the same way that similar indicia on a clock face co-act with the hands of the clock (R. 56-39). Representative charts in suit are reproduced herein as Appendices A and B, pages 17 and 18.

2. These charts are functioning structural elements of the machine, necessary to complete it and render it usable (R. 56-59, 116-118). They are consumed in large quantities by the operation of the machine (R. 58-59; Resp. Exh. 9, comprising petitioner's catalogs, catalog 64, p. 9). The computations and measurements involved in making both the machine and its chart, are for the purpose of positioning the reference graduation lines on the chart to coincide precisely with the corresponding positions of the instrument pointer (R. 43 [Finding of Fact 5], 56, 61, 15, 21, 123). The Register of Copyrights, trial court, and court of appeals all concurred in finding that the chart is an integral part of the machine (R. 17, 20, 43 [Finding of Fact 4], 173).

3. Instrument charts are blank forms, a species of blank graph paper (R. 43 [Finding of Fact 5]), as is immediately made apparent by comparing petitioner's charts, appendices A and B, with ordinary circular graph paper, appendix D, page 20. These charts contain no information, and are incapable of conveying any message (R. 43 [Finding of Fact 7] 86, 91, 97A; appendices A and B herein).

Accordingly, they are not "writings of an author" within the meaning of the copyright statute (17 U. S. C. 4) and the Constitution (Art. 1, Sec. 8, Cl. 8) (R. 43 [Finding of Fact 7]). The Register of Copyrights therefore refused to issue copyright certificates upon petitioner's charts. The tribunals below each expressly confirmed all the foregoing facts, and affirmed the action of the Register (R. 43, 173).

REASONS URGED FOR DENYING CERTIORARI.

1. The case involves nothing new or unusual. The concurring decisions below are manifestly correct, and in complete harmony with all the cases and treatises on the subject.

2. The case merely involves an obvious application of the rule announced by this Court in *Baker* v. *Selden*, 101 U. S. 99 (1879), as consistently applied by the courts and Copyright Office for 68 years.

3. This is an abortive attempt to re-try *Taylor Instrument Companies* v. *Fawley-Brost Co.*, wherein this Court has already denied certiorari.

4. Petitioner has committed itself to the position that this is purely a private controversy, and this Court is not at petitioner's disposal for settling petitioner's private matters.

5. Petitioner asks this Court to settle sham issues, which cannot be reached on the record, and which would not affect the judgments below.

ARGUMENT.

POINT 1.

The questions which petitioner attempts to raise cannot properly be presented to this Court on the record herein. Furthermore, it would be useless to consider them, since the concurrent judgments below must be affirmed on other grounds.

Petitioner asks this Court to decide whether the ultimate intended use of otherwise copyrightable matter can destroy the copyright status thereof. The question obviously is moot, since this case involves matter which clearly is uncopyrightable even when considered apart from its intended use.

Only a medium which communicates the intellectual or emotional ideas of an author to his readers can be a "writing" within the meaning of the Constitution[1] and the copyright statute.[2] As this Court has pointed out:

> "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains."[3]

The writing must convey information about the topic which is its subject matter; it must be a medium for the dissemination of ideas. Copyright embraces the "language employed by the author to convey his ideas more clearly".

Baker v. *Selden*, 101 U. S. 99, 103 (1879).

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1. Art. 1, Sec. 8, clause 8.
2. 17 U. S. C. 4.
3. *Baker* v. *Selden*, 101 U. S. 99, 103 (1879).

See also:

Davis v. *Comitti*, 52 L. T. Rep. (N. S.) 539 (1885).

Taylor Instrument Companies v. *Fawley-Brost Co.*, 139 F. 2d 98, 100 (7 C. C. A., 1943), cert. den. 321 U. S. 785 (1944).

Amberg File and Index Co. v. *Shea Smith and Co.*, 82 Fed. 314, 315 (7 C. C. A., 1897).

No court has even held that an article may be copyrightable even though it is not a medium of communication. Realizing that this is the law, petitioner alleges that its charts "teach and convey useful engineering information".[1] But petitioner was totally unable to prove this contention. It made no attempt to show the tribunals below how to read these charts, or any one of them. Its expert, when challenged on cross-examination, was unable to read anything from them (R. 86), and the record is devoid of any scintilla of information read from any one of the 83 charts in issue.

The opinion of the trial court states (R. 42):

> "Plaintiff's contention that these charts convey information of a scientific nature seems to be rather a pretext."

So is petitioner's representation to this Court (Petn. 13) that:

> "Petitioner is seeking merely to obtain copyrights for the original scientific data printed on the charts."

If petitioner really desired to disseminate the information used in making its charts, it would publish this information in the conventional written form in which it keeps this data for its own use. (Petn's. Exh. 8, R. 71), and which anyone can read in the ordinary way.

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1. Petn. cert. p. 10, second specification of error. Cf. p. 2, item 3 of petitioner's statement of facts; p. 6, first question presented.

The allegation that the printed matter on the charts is based on mathematical calculations and scientific principles, and that therefore these working specifications can be deduced from the charts, is pointless, since the same data can be deduced from the rest of the machine without reference to the charts. By examination of an apple pie, a cook or chemist can determine the quantitative recipe from which it was baked. The recipe obviously is subject matter for copyright; petitioner argues that the pie therefore is also copyrightable (Petn., p. 3 #3, p. 10 (pt. I)). As a matter of fact, examination of any article will reveal to the expert the mathematical and scientific specifications on which it is built. Petitioner's argument therefore would extend copyrightability to every machine and article of manufacture, no matter how ancient. Hence the decisions below were necessary to protect the fundamental principles of the patent laws.

The question whether copyrightable material loses its status because more copyrightable material will later be added to it (Petr's. issue 1) is not involved in this case, since petitioner's charts do not contain any copyrightable material conveying information in the first place. The printed matter on the chart simply functions like the lines and numerals on a yardstick, and is used solely to measure the position of the pointer of the machine, either directly or from the graph traced on the chart by the inked tip of the pointer.

As was the case with the instrument charts held uncopyrightable for that reason in *Davis* v. *Comitti*, 52 L. T. Rep. (N. S.) 539, 540 (1885), petitioner's charts "tell nothing. By reading the printed matter on the card alone no intelligible proposition is arrived at." This distinguishes these instrument charts from motion picture films and stereoptican pictures, for the latter tell their stories even to the illiterate.

Thus it is conclusively settled on the record herein and the concurring findings of fact below, that the printed matter on petitioner's charts is not "writing" within the meaning of the copyright statute and the Constitution (R. 43, 173).

This Court does not disturb concurrent findings of fact unless they are plainly without any support.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 178 (1938).

Williams Manufacturing Co. v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367 (1942).

Goodyear Tire & Rubber Co., Inc. v. *Ray-O-Vac Company*, 321 U. S. 275, 278 (1944).

Tennessee Coal, Iron & R. R. Co. v. *Muscoda Local No. 123*, 321 U. S. 590, 604 (1944).

Furthermore, certiorari is not granted to review the evidence or inferences drawn from it.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 178 (1938).

In the instant case, moreover, *there is no evidence at all to support petitioner's contentions.* Petitioner unpardonably misinformed this Court by repeatedly falsely stating that the courts below expressly found that petitioner's charts taught and conveyed useful information[1] and that such is "concededly" the case.[2] The truth is that the respondent administrative official and both courts below not only did so concede, but positively asserted exactly the opposite. Certiorari has often been denied for failure to present the case accurately and fairly.

Missouri Pacific R. R. Co. v. *Hanna*, 226 U. S. 184 (1924).

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1. Petition for certiorari, p. 4.

2. Ibid., pp. 6 (first question presented) and 10 (second specification of errors). Cf. pp. 2, 10 (point I).

Furness, Withy & Co., Ltd. v. *Yang-Tsze Insurance Association, Ltd.*, 242 U. S. 430, 433 (1917).
U. S. v. *Rimer*, 220 U. S. 547, 548 (1911).
Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508, 509 (1924).

POINT 2.

Certiorari has already been denied upon the identical issue, in recent proceedings participated in by petitioner and applicant. There is no reason for this Court to consider the matter again.

Taylor Instrument Companies v. *Fawley-Brost Co.* (7 C. C. A., 1943), 139 F. 2d 98, held that instrument charts are not copyrightable, and this Court denied certiorari (No. 689), 321 U. S. 785 (1944). Petitioner Brown Instrument Co., through the chairman of its board, gave testimony in the *Taylor* case, involving the premise that petitioner's charts were legally and technologically like the *Taylor* charts there in issue.[1] Petitioner Brown entered its appearance in the *Taylor* case as *amicus curiae*, and pressed this Court to grant certiorari, pointing out that it manufactured charts like those in issue in the *Taylor* case, and that a decision on that record would settle the copyrightability of its charts. In its brief in the pending case, petitioner again recognizes that instrument charts are legally all in one category, for it states that the decision here sought to be reviewed affects the status of thousands of copyright registrations upon charts of other manufacturers.[2]

Respondent found that petitioner's charts were identical in kind with the charts in issue in the *Taylor* case, and that

1. Record in *Taylor Instrument Companies* v. *Fawley-Brost Company*, October term 1943, No. 689, p. 355 ff.

2. Petn., pp. 14, 15.

they were controlled by that precedent (R. 17, 19-20). The courts below agreed (R. 42, 173). A glance at typical charts in issue in the two cases (Appendices B and C, pages 18 and 19) shows they were right.

In the interval since certiorari was denied in the *Taylor* case, no act of Congress or decision by this Court has intervened to require or permit a re-examination of the copyrightability of instrument charts. Hence the profert of this issue should again be rejected, and the petition for certiorari denied.

Furthermore, petitioner has elected, for the purpose of affecting the presentation of the case in this Court, to make a private matter of it (Motion, item 7, p. 3 preceding); and this is not a Court for hearing private disputes.

Fields v. *U. S.*, 205 U. S. 292, 296 (1907).

Forsyth v. *Hammond*, 166 U. S. 506, 514 (1897).

Mr. Ch. J. Hughes, addressing the American Law Institute meeting. 20 Amer. Bar Ass'n J. 341 (June, 1934).

POINT 3.

The decisions below are correct, consistent with the statute, and required by long settled decisions of this Court. They announce nothing new or unusual.

The court below held (R. 173):

> "We think, moreover, that the case is controlled by *Baker* v. *Selden*, 101 U. S. 99. That case involved blank forms for use in bookkeeping. They were intended to be written on by hand. and the blank forms now in suit are intended to be written on by a machine, but this difference is immaterial. Neither sort of forms is intended to communicate facts or ideas. Both sorts are intended solely for use in making records of facts."

In the *Baker* case, this Court held that Selden's printed forms were "not the subject of copyright" because they were "blank books whose principal function is to be written upon" 101 U. S. 99, 107. The situation here is exactly the same.

The *Baker* case is universally accepted as having established "ultimate use" as a criterion of copyrightability, and as having settled the rule that copyright cannot reside in "articles of practical use."

> *Amberg File and Index Co.* v. *Shea Smith and Co.*, 82 Fed. 314 (7 C. C. A., 1897).
>
> *Taylor Instrument Companies* v. *Fawley-Brost Co.*, 139 F. 2d 98 (7 C. C. A., 1943), cert. den. 321 U. S. 785 (1944).

This Court defined the phrase "practical use" as meaning, in copyright law, the antithesis of "explanatory writing" or "literary use," 101 U. S. 99, 103, and the court below correctly used the term in the same sense when it held that "Articles intended for practical use * * * are not copyrightable" (R. 173).

> *Crume* v. *Pacific Mutual Life Ins. Co.*, 140 F. 2d 182-185 (7 C. C. A., 1944), cert. den. 322 U. S. 755.
>
> Amdur, "Copyright Law and Practice" (1936), p. 15.

Ball, "Law of Copyright and Literary Property" (1944) states the principle thus (p. 78):

> **"Utilitarian Devices.**
>
> "While the Copyright Law embraces those intellectual productions which are designed for conveying information, or explanation, or for inculcating culture and appreciation, it does not include devices or mecha-

nisms, however ingenious, whose intrinsic value is derived from their manipulation for utilitarian purposes."

The Regulations of the copyright office for years have provided that instruments or tools of any kind are not copyrightable (Code Fed. Regs., Chap. II, title 37, § 201.4 (7)); neither are "words, figures, symbols, etc., essential to the operation of such devices" (ibid., § 201.4(1)).

Motion picture film and stereoptican pictures are copyrightable because their sole value lies in the information they convey. This information can be read from them without using the stereoptican or motion picture projector, which are merely devices for magnifying, illuminating and adding the illusion of depth or motion. This brief can be thrown on a screen by a projector. Nevertheless, the "ultimate use" of the printed brief or the motion picture is to communicate ideas; the machine merely facilitates this. The "ultimate use" of petitioner's chart, on the other hand, is to be manipulated as a tool to measure some physical quantity, such as temperature. The pointer of petitioner's machine takes a predetermined position at a particular value of the temperature, speed, time or other quantity being measured. Accordingly, the reference line and numeral on the chart which indicate that value must be positioned at this one point and none other. Hence, copyright on the position of this line, or the numerical value ascribed to it, would monopolize the use of the machine. The case of motion picture film and stereoptican pictures is entirely different for the copyright monopolizes only the story told by the particular picture, and does not prevent the machine from being used with thousands of other pictures.

This exposes the vice of petitioner's "poem" argument. For when it asserts that it is entitled to statutory monopoly

upon a poem impressed upon a machine part (Petn. 14), it is obvious that the real intent is not to protect the literary work in the poem, but to obtain a monopoly upon the machine part, and thus upon the machine.

The assertion of copyright in machine charts has been consistently used to force the owner of the machine to purchase these unpatented replacement parts solely from the vendor of the machine.[1] This is an affront to the Antitrust Laws, which the decision below will correct.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

.....

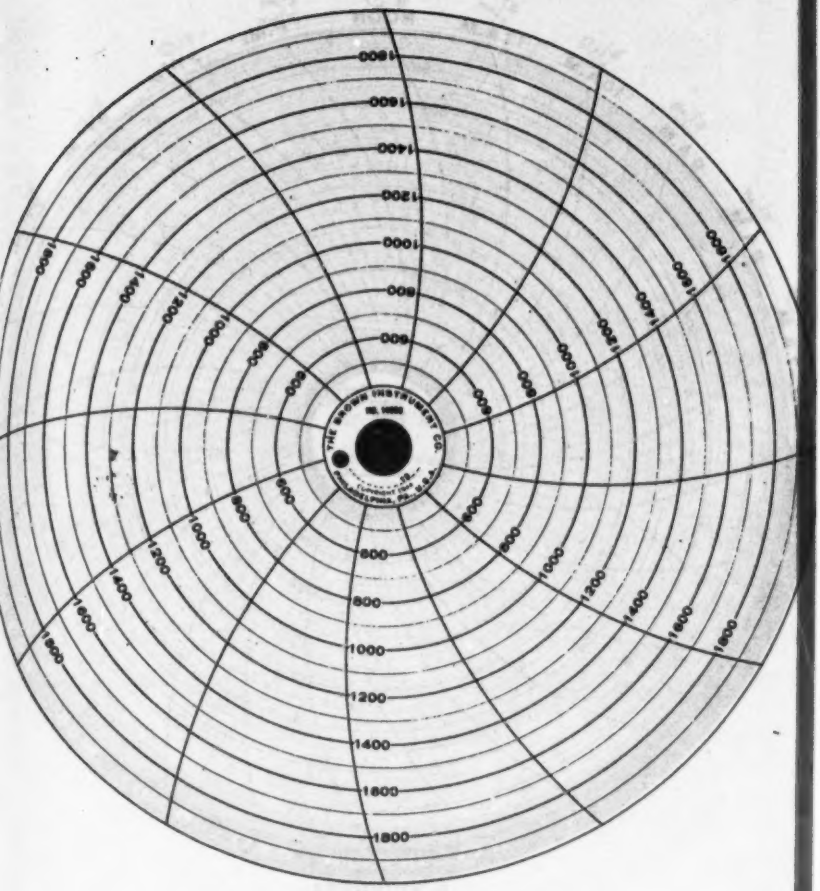
ALBERT I. KEGAN,

.....

ESTHER O. KEGAN,

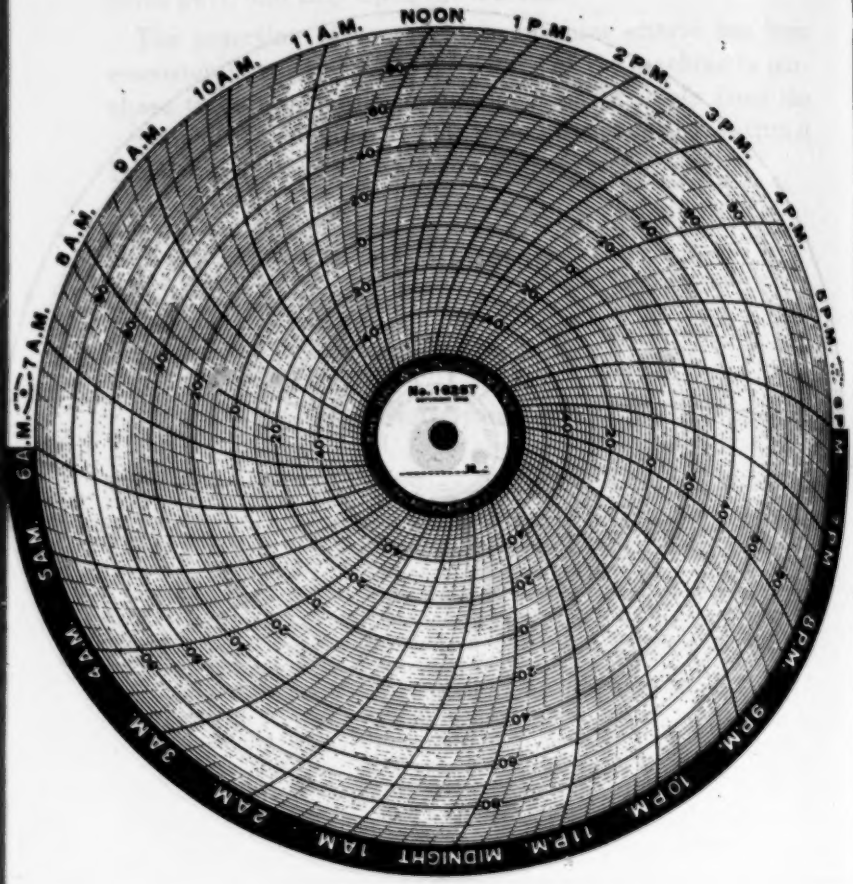
Attorneys for Fawley-Brost Co.

1. Testimony of petitioner's chairman *Brown* in the *Taylor* case, No. 689—1943 term, *Taylor* R. 356, 358.



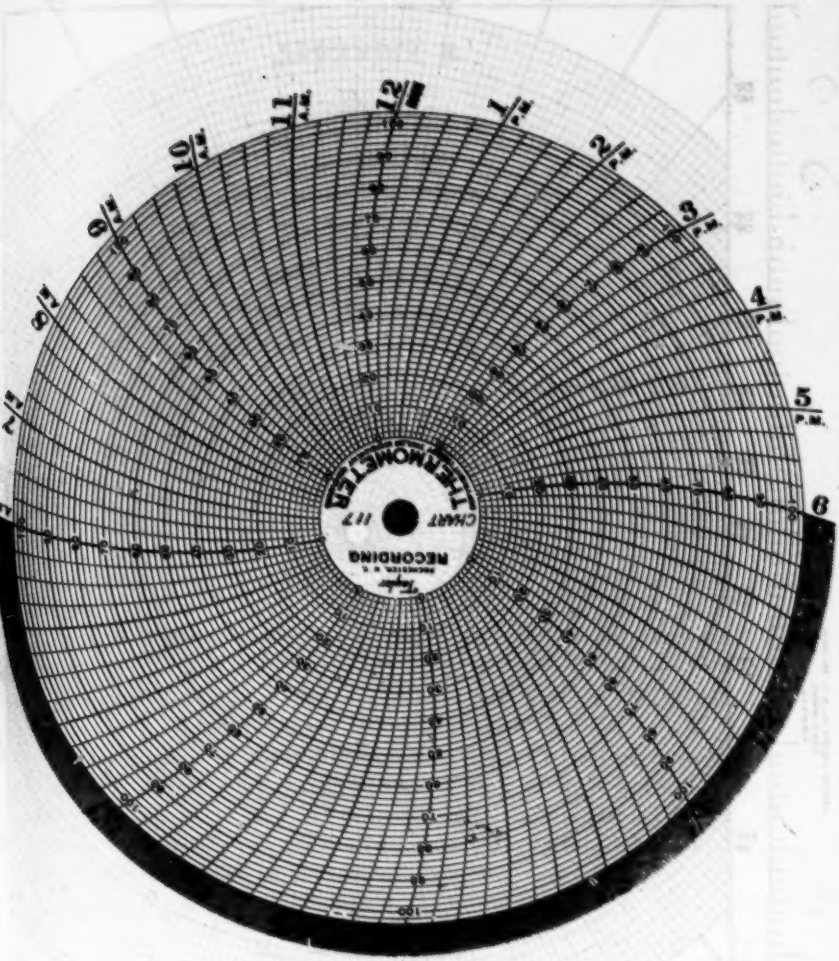
APPENDIX A.

One of Petitioner's Charts In Issue.



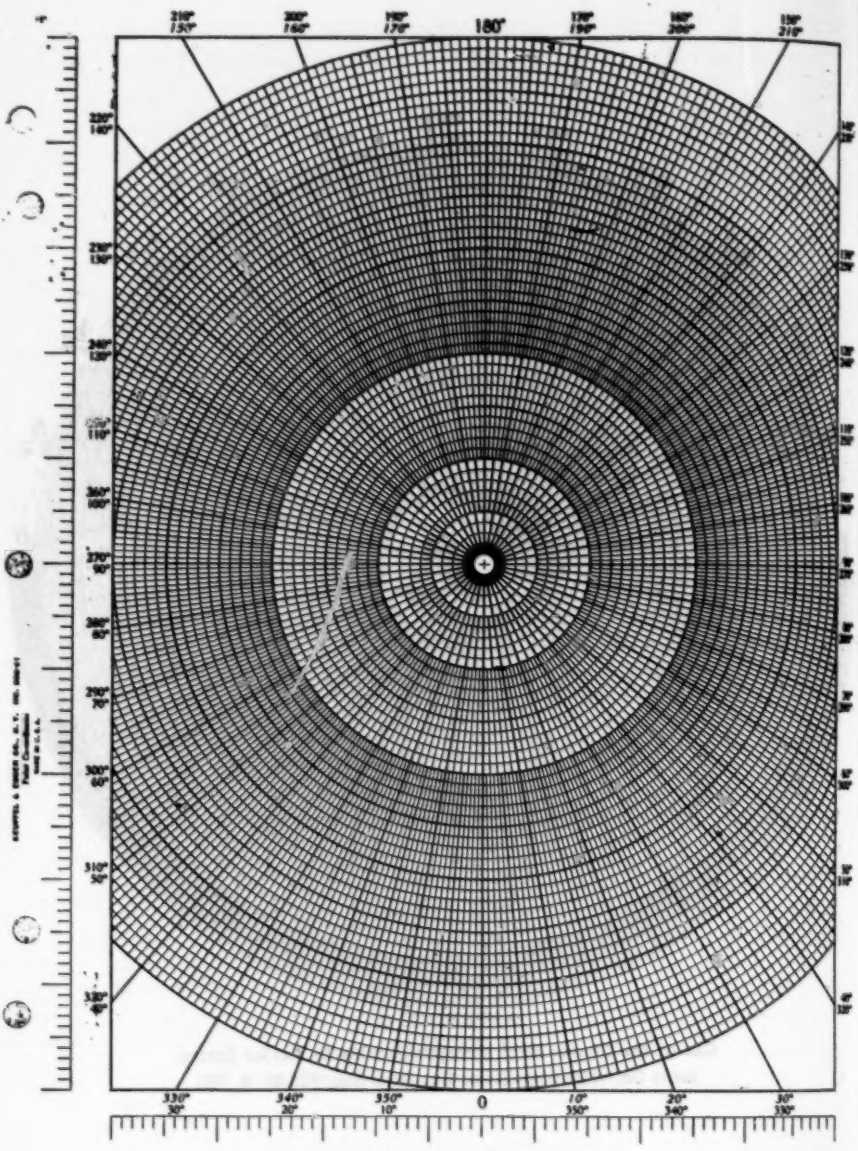
APPENDIX B.

Another of Petitioner's Charts In Issue.



APPENDIX C.

One of the Charts Held Uncopyrightable in Taylor Instrument Co. v. Fawley-Brost Co., cert. den. 321 U. S. 785.



APPENDIX D.

Ordinary Circular Graph Paper.

APPENDIX E.

DARBY & DARBY
Attorneys and Counselors at Law
Patents, Trademarks, Copyrights
Chrysler Building
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August 26, 1947

Albert I. Kegan, Esq.
Kegan and Kegan
29 South La Salle Street
Chicago 3, Ill.

Re: *Brown Instrument Co.* v. *Warner*

DEAR MR. KEGAN:

This will acknowledge receipt of your favor of August 25th requesting consent to your filing a brief *amicus curiae* in the above case in which a petition for writ of certiorari will be filed by the plaintiff this present week.

Unfortunately I am unable to consent. This controversy is a private one and involves as its only issue whether or not the plaintiff is entitled to copyright registration for its original writings. Neither you nor your client can have any proper interest in that question.

With best personal regards, I am

Very truly yours,

(signed) SAMUEL E. DARBY, JR.